In re: MANGOS PLUS, INC.
PACA Docket No. D-98-0025.
Decision and Order filed June 15, 2000.

Failure to pay – Flagrant and repeated violations – Publication of facts and circumstances.

The Judicial Officer affirmed the decision by Chief Judge Hunt concluding that Respondent committed flagrant and repeated violations of the Perishable Agricultural Commodities Act, 1930 (PACA), by failing to make full payment promptly for produce. The Judicial Officer denied Respondent's petition to reopen the hearing. The Judicial Officer rejected Respondent's contention that the investigation conducted by the United States Department of Agriculture, Agricultural Marketing Service, to determine whether Respondent violated the PACA, was deficient. As Respondent no longer had a PACA license, the Judicial Officer ordered the publication of the facts and circumstances set forth in the Decision and Order.

Kimberly D. Hart, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.49) [hereinafter the PACA Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on August 13, 1998.

The Complaint alleges that: (1) during the period March 1996 through July 1998, Mangos Plus, Inc. [hereinafter Respondent], failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of $922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ IV). On December 3, 1998, Respondent filed an Answer denying the material allegations of the Complaint.

On November 4, 1999, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted an oral hearing in New York, New York. Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent. On January 14, 2000, Complainant filed Complainant's Proposed Findings of Fact, Conclusions, Order and Supporting

Brief.

On March 14, 2000, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) found that, during the period March 1996 through June 1998, Respondent purchased, received, and accepted in interstate commerce, from 30 produce sellers, 306 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $922,742.43; (2) found that, at the time of the November 4, 1999, hearing, approximately $228,000 of the $922,742.43 debt was still outstanding; (3) concluded that Respondent's failures to make full payment promptly to produce sellers of the agreed purchase prices totaling $942,742.43[1] constitute repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the facts and circumstances set forth in the Initial Decision and Order (Initial Decision and Order at 5).

On April 18, 2000, Respondent appealed to the Judicial Officer and petitioned to reopen the hearing; on May 30, 2000, Complainant filed Complainant's Response to Respondent's Appeal Petition; and on June 1, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's petition to reopen the hearing and for a decision.

Section 1.146(a)(2) of the Rules of Practice provides, as follows:

> § **1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite.* . . . .
>
> (2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

Respondent failed to set forth a good reason why the evidence, which it now wishes to introduce, was not adduced at the November 4, 1999, hearing. Therefore, Respondent's petition to reopen the hearing is denied.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's

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[1]I infer, based on the Findings of Fact in the Initial Decision and Order, the Chief ALJ's conclusion that Respondent failed to pay agreed purchase prices totaling "$942,742.43" is a typographical error and that the correct amount is "$922,742.43."

Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's Conclusion of Law, as restated.

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of

this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted[.]

7 C.F.R. § 46.2(aa)(5).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Facts

Respondent was issued PACA license number 961267 on April 8, 1996. Respondent's business address was 434-436 New York City Terminal Market, Bronx, New York 10474. Respondent's PACA license was terminated on April 8, 1999, for failure to pay the annual license renewal fee. (Answer ¶ 2; CX 1 at 1, 16.)

After receiving several reparation complaints filed against Respondent, the United States Department of Agriculture, Agricultural Marketing Service, in March 1997, began an investigation to determine whether Respondent was complying with the PACA's "full payment promptly" requirement. This prompt payment provision requires a produce commission merchant, dealer, or broker to make full payment of the agreed purchase price for produce within 10 days after the day on which the produce is accepted. Carolyn Shelby, an investigator employed by the United States Department of Agriculture, Agricultural Marketing Service, found, after reviewing the records of Respondent's produce transactions, that Respondent had failed to pay approximately $550,000 for purchases of produce in interstate commerce. Respondent did not deny these findings. Respondent said the debt was caused by slow sales, legal fees, rent, and other expenses. Further investigation revealed that, during the period March 1996 through July 1998, Respondent purchased, received, and accepted in interstate commerce 306 lots of perishable agricultural commodities from 30 produce sellers but failed to make full payment promptly of the agreed purchase prices in the total amount of $922,742.43. (Tr. 9-23; CX 3-CX 32.)

Respondent paid some of this debt, but, at the time of the hearing on November 4, 1999, approximately $228,000 was still outstanding. In addition, Respondent had incurred approximately $457,000 in new debt for produce. (Tr. 23-29; CX 33, CX 34, CX 35.)

Respondent contended at the hearing that Ms. Shelby's testimony relating to Respondent's alleged failure to make full and prompt payments should not be admitted because Ms. Shelby did not make a complete inquiry about Respondent's alleged debt (Tr. 68-69). This contention is rejected. Complainant has the burden,

in establishing a *prima facie* case, to come forth with evidence that Respondent was not in compliance with the PACA's prompt payment requirement. Ms. Shelby's testimony on this point was reliable and sufficient to establish Complainant's case. Any evidence that Respondent had made full and prompt payments was as available, if not more so, to Respondent as it was to Complainant. Thus, once Complainant established a *prima facie* case of Respondent's failure to comply with the PACA's prompt payment requirement, the burden was on Respondent to show that it had paid its produce sellers in accordance with the PACA.

Discussion

The purpose of the PACA is to not only protect growers and producers from the "sharp practices of financially irresponsible and unscrupulous brokers" in the produce industry, but also to protect growers and producers from any produce dealer or broker who, regardless of the reason, fails to pay promptly for the produce it buys. *In re Tony Kastner and Sons Produce Co.,* 51 Agric. Dec. 741, 745 (1992); *In re Oliverio, Jackson, Oliverio, Inc.,* 42 Agric. Dec. 1151, 1159 (1983). When there is more than one failure to make full payment promptly and the amount is more than *de minimis*, the violations of the PACA are repeated and flagrant. The penalty for failure to make full payment by the time of the hearing is revocation of the respondent's license or, if the license has expired, publication of a finding that the respondent has committed repeated and flagrant violations of the PACA. *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. at 1156. Accordingly, as Respondent failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of $922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce, Respondent committed repeated and flagrant violations of the PACA. This finding will be published.

Findings of Fact

1. Respondent, Mangos Plus, Inc., is a New York corporation whose last known business address was 434-436 New York City Terminal Market, Bronx, New York 10474.

2. Respondent received PACA license number 961267 on April 8, 1996. Respondent's PACA license terminated on April 8, 1999, when Respondent failed to pay the annual license renewal fee.

3. During the period March 1996 through July 1998, Respondent purchased, received, and accepted in interstate commerce, from 30 produce sellers, 306 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $922,742.43.

4. At the time of the hearing, on November 4, 1999, approximately $228,000

of the $922,742.43 debt was still outstanding.

Conclusion of Law

Respondent's failures to make full payment promptly to produce sellers of the agreed purchase prices totaling $922,742.43 constitute repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends in its Appeal Petition that "[a]t the close of the hearing, and after evaluating the evidence, the [Chief] ALJ issued a decision that finds the investigation by the Complainant to be credible and reliable despite [four] deficiencies." (Appeal Pet. at 3.)

The Chief ALJ did not find that the United States Department of Agriculture, Agricultural Marketing Service, investigation was credible and reliable, as Respondent contends. Instead, the Chief ALJ addressed Respondent's motion to strike Ms. Shelby's testimony, based on Respondent's contention that Ms. Shelby's investigation was not complete, as follows:

> Respondent contended at the hearing that the investigator's testimony relating to Respondent's alleged failure to make full and prompt payments should not be admitted because the investigator did not make a complete inquiry about Respondent's alleged debt. (Tr. 68-69.) This contention is rejected. Complainant had the burden, in establishing a *prima facie* case, to come forth with evidence that Respondent was not in compliance with PACA's prompt payment requirement. The investigator's testimony on this point was reliable and sufficient to establish Complainant's case. Any evidence that Respondent had made prompt payments was as available, if not more so, to Respondent as it was to Complainant. Thus, once Complainant established a *prima facie* case of noncompliance, the burden was on Respondent to show that it had come into compliance by making payments to its creditors.

Initial Decision and Order at 2-3.

I agree with the Chief ALJ's rejection of Respondent's motion to strike. Respondent's focus on the extent of Ms. Shelby's investigation is misplaced. The issue in this proceeding is not whether Ms. Shelby should have conducted a more extensive investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), but rather the issue is whether Complainant proved by a preponderance of the evidence that Respondent violated section 2(4) of the

PACA (7 U.S.C. § 499b(4)).[2]

Complainant established a *prima facie* case that, during the period March 1996 through July 1998, Respondent failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of $922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce, and that, at the time of the November 4, 1999, hearing, approximately $228,000 of the $922,742.43 debt was still outstanding. Respondent failed to rebut Complainant's evidence. Therefore, I agree with the Chief ALJ's conclusion that Complainant proved by a preponderance of the evidence that Respondent failed to make full payment promptly for perishable agricultural commodities as alleged in the Complaint.

Even if I found that Ms. Shelby could have engaged in a more thorough

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[2]Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re Sunland Packing House Company*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *reprinted in* 58 Agric. Dec. 474 (1999), *final decision on remand*, 58 Agric. Dec. ___ (Nov. 29, 1999), *appeal docketed*, No. 00-1011 (D.C. Cir. Jan. 13, 2000); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 120 S. Ct. 530 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1575 (1999); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94–4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94–70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), that finding would not cause me to reverse the Chief ALJ because Complainant proved by a preponderance of the evidence that Respondent failed to make full payment promptly of the agreed purchase prices of perishable agricultural commodities, as alleged in the Complaint, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Moreover, Respondent's contention that Ms. Shelby's investigation was deficient, lacks merit. First, Respondent contends Ms. Shelby failed to examine the nature of the debt owed by Respondent to R & S Distributors, Inc. (Appeal Pet. at 3). Specifically, Respondent states:

> The largest creditor listed in the complaint is R&S Distributors, Inc. ("R&S") of Tomkins Grove, New York. The amount listed in the complaint is $157,002.29. The president of R&S, at the time of the alleged transaction, was Steve Hitchings. Steve Hitchings is also the president of Mangos Plus, Inc., the respondent in this action. In investigating the nature of the debt alleged to have existed between Mangos and R&S, the investigator for the Complainant failed to interview Mr. Hitchings. Instead, the investigator interviewed a James Corn, who has a vested interest in misstating the alleged debt. Mr. Corn presently owns and operates R&S and would presumably benefit from overstating the amount of debt between the two companies. The evidence supporting this assertion may be found in analyzing the contents of the federal lawsuit pending in the Southern District of New York. The Complainant failed to examine the pleadings and the claims in that lawsuit[.]

Appeal Pet. at 3.

Ms. Shelby obtained copies of R & S Distributors, Inc., invoices from Respondent's records. These invoices support a finding that Respondent failed to make full payment promptly to R & S Distributors, Inc., as alleged in paragraph III of the Complaint.[3] (CX 13.) After Complainant filed the Complaint, but before the hearing, Ms. Shelby contacted a representative of R & S Distributors, Inc., Mr. Jim Corn, who informed Ms. Shelby that Respondent had paid the debt to R & S Distributors, Inc., listed in the Complaint and had incurred new debt for produce totaling approximately $274,000. Ms. Shelby subsequently obtained R & S Distributors, Inc., invoices that confirm Mr. Corn's assertion that Respondent incurred new debt for produce totaling approximately $274,000. (Tr. 36-38; CX

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[3]The Complaint alleges that Respondent failed to make full payment promptly to R & S Distributors, Inc., of the agreed purchase prices in the total amount of $157,002.29 for 56 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III).

33E, CX 34 at 1, CX 35 at 11.)

Respondent contends that "the pleadings and the claims" in a lawsuit filed in the United States District Court for the Southern District of New York support its assertion that Mr. Corn overstated Respondent's debt to R & S Distributors, Inc. Respondent could have introduced, but did not introduce, documents filed in this lawsuit to rebut Complainant's evidence regarding the amount that Respondent owed to R & S Distributors, Inc., for perishable agricultural commodities.

In addition, Respondent contends that Ms. Shelby should have interviewed Mr. Stephen Hitchings when investigating the amount of the debt Respondent owed to R & S Distributors, Inc. Mr. Stephen R. Hitchings is Respondent's president (CX 1 at 1). Respondent could have called, but did not call, Mr. Hitchings as a witness to rebut Complainant's evidence regarding the amount Respondent owed to R & S Distributors, Inc., for perishable agricultural commodities.

I do not find Ms. Shelby's investigation deficient merely because she did not review the pleadings and claims filed in the lawsuit in the United States District Court for the Southern District of New York referenced by Respondent and did not interview Mr. Hitchings regarding the amount Respondent owed to R & S Distributors, Inc., for perishable agricultural commodities. Complainant introduced reliable, probative, and substantial evidence that Respondent failed to make full payment promptly to R & S Distributors, Inc., of the agreed purchase prices in the total amount of $157,002.29 for 56 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce and that, at the time of the hearing, Respondent owed R & S Distributors, Inc., approximately $274,000 for produce. Respondent failed to rebut Complainant's evidence. Therefore, I find that Complainant proved by a preponderance of the evidence that Respondent failed to make full payment promptly to R & S Distributors, Inc., of the agreed purchase prices in the total amount of $157,002.29 for 56 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce and that, at the time of the hearing, Respondent owed R & S Distributors, Inc., approximately $274,000 for perishable agricultural commodities.[4]

Second, Respondent contends Ms. Shelby's deficient investigation caused Complainant to attribute Sciandra International's failures to comply with section 2(4) of the PACA (7 U.S.C. § 499b(4)) to Respondent (Appeal Pet. at 3-4). Specifically, Respondent states:

> In addition to the R&S blunder, the Complainant misconstrued other corporate matters as well. Included in the allegations against the respondent are outstanding unpaid invoices to a company named Sciandra. Sciandra and Mangos are separate corporate entities and each has held separate and

[4]See note 2.

> distinct PACA licenses. However, Joseph DePieto was a responsibly connected person to both corporate entities. After Mr. DePieto left Mangos he was interviewed by the Complainant concerning debts of Mangos. Mr. DePieto included the unpaid produce debt of Sciandra as unpaid debt of Mangos. Mangos did not assume these debts and Mangos was not liable, under the PACA, for any of Sciandra's debts. It was in Mr. DePieto's self interest to overstate Mango's liabilities at the expense of lessening Sciandra's unpaid trust debt. Again, the Complainant never interviewed Mr. Hitchings in this regard.

Appeal Pet. at 3-4.

Ms. Shelby testified that she obtained several invoices (CX 3, CX 4, CX 6, CX 8, CX 19) from Respondent's records which identified Sciandra International as the produce purchaser (Tr. 32-33, 48-52, 64-66). Ms. Shelby asked Joseph P. DePietto, who, at the time, was the secretary, director, and 50 percent owner of Respondent (CX 1 at 5-13, 15-19), why these invoices were in Respondent's records. Mr. DePietto informed Ms. Shelby that Respondent had purchased two units on Row A of the New York City Terminal Market (Hunts Point Market) from Sciandra International and that five produce sellers (H. Schnell & Co., Green Pepper Farm, Inc., Kendall Foods, Inc., Banacol Marketing Corporation, and L & P Fruit Corporation) had mistakenly identified the former tenant of these units, Sciandra International, as the produce purchaser on the invoices in question. Neither Mr. DePietto nor Mr. Hitchings denied that Respondent purchased the produce described on the invoices in question (Tr. 31-32, 49-52).

Respondent contends Ms. Shelby interviewed Mr. DePietto after he terminated his relationship with Respondent and that Mr. DePietto was responsibly connected with Sciandra International. Therefore, Respondent argues it was in Mr. DePietto's self-interest to attribute Sciandra International's produce debt to Respondent. (Appeal Pet. at 4.) I find no evidence in the record that indicates Mr. DePietto was responsibly connected with Sciandra International. Moreover, Ms. Shelby interviewed Mr. DePietto in March 1997 (Tr. 10-11), and Mr. DePietto did not resign as secretary and director of Respondent until May 30, 1997, and did not relinquish his interest in Respondent until July 7, 1997 (CX 1 at 5-8). Finally, Mr. DePietto was responsible for providing Ms. Shelby with the documents necessary for her investigation and answering Ms. Shelby's questions regarding Respondent's record-keeping system (Tr. 10-14).

I do not find Ms. Shelby's investigation deficient because she interviewed Mr. DePietto, but did not interview Mr. Hitchings, regarding the invoices in Respondent's records which identify Sciandra International as the produce purchaser. Respondent could have called, but did not call, Mr. Hitchings as a witness to rebut Complainant's evidence that Respondent was the purchaser of produce described on the invoices which identify Sciandra International as the

produce purchaser. Complainant introduced reliable, probative, and substantial evidence that Respondent was the purchaser of produce described on the invoices which identify Sciandra International as the produce purchaser (CX 3, CX 4, CX 6, CX 8, CX 19). Respondent failed to rebut Complainant's evidence. Therefore, I find that Complainant proved by a preponderance of the evidence that Respondent purchased the produce described on the invoices which identify Sciandra International as the produce purchaser (CX 3, CX 4, CX 6, CX 8, CX 19).[5]

Third, Respondent contends Ms. Shelby failed to review the disposition of the reparation proceedings that caused the United States Department of Agriculture, Agricultural Marketing Service, to initiate the investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Appeal Pet. at 4). Specifically, Respondent states:

> Despite the fact that the Complainant's investigation was initiated due to the number of reparation complaints that were filed with the Complainant, the testimony at the hearing revealed that the Complainant failed to review the results, if any, of the reparation complaints that were filed against Mangos. This fact is important because the evidence in the reparation cases, including the claims by . . . unpaid produce creditors, cover the same transactions that are alleged in this complaint. In fact, at least one of the reparation complaint decisions resulted in favor of the respondent Mangos.

Appeal Pet. at 4.

During the period November 1996 to February 1997, the United States Department of Agriculture received reparation complaints totaling approximately $500,000 which produce sellers filed against Respondent. These reparation complaints triggered the United States Department of Agriculture, Agricultural Marketing Service, investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). (Tr. 10.) However, there is no evidence that these reparation complaints form the basis for the Complaint issued in this proceeding or that these reparation complaints cover the same transactions that are alleged in the Complaint. To the contrary, the record establishes that the Complaint is based upon Ms. Shelby's independent review of Respondent's records.

I do not find Ms. Shelby's investigation deficient merely because she did not review reparation complaints filed against Respondent or the disposition of these reparation proceedings. Respondent could have introduced evidence regarding the disposition of these reparation proceedings to rebut Complainant's evidence that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), but chose not to do so.

Fourth, Respondent contends the alleged unpaid produce creditors filed an

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[5]See note 2.

action to enforce their trust rights under the PACA against Respondent and Ms. Shelby failed to review any aspect of the case (Appeal Pet. at 4). Specifically, Respondent states:

> As it frequently occurs, the alleged unpaid produce creditors filed an action to enforce their trust rights under the PACA against Mangos in the United States District Court, Southern District of New York. In such an action claimants are required to file claims under oath and the defendant has the opportunity to oppose each claim. Despite the obvious relevance to the proof in this case, the Complainant failed to review any aspect of the federal case file.

Appeal Pet. at 4.

Respondent's creditors instituted an action against Respondent in the United States District Court for the Southern District of New York, and Ms. Shelby did not review the documents filed in that proceeding as part of her investigation to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Tr. 45). I do not find Ms. Shelby's investigation deficient merely because she did not review documents filed in a civil action instituted by Respondent's creditors in the United States District Court for the Southern District of New York. Respondent could have introduced, but did not introduce, documents filed in this civil action to rebut Complainant's evidence that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Complainant introduced reliable, probative, and substantial evidence that, during the period March 1996 through July 1998, Respondent failed to make full payment promptly to 30 sellers of the agreed purchase prices in the total amount of $922,742.43 for 306 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce. Moreover, the record establishes that Ms. Shelby contacted 24 of the 30 produce sellers identified in the Complaint and found that, at the time of the hearing, Respondent owed these produce sellers approximately $228,000 of the $922,742.43 alleged in the Complaint. In addition, the record establishes that Respondent incurred additional produce debt totaling $457,591.59 between the time the Complaint was filed and the date of the hearing. Respondent failed to rebut Complainant's evidence. Therefore, I find that Complainant proved by a preponderance of the evidence that Respondent violated section 2(4) of the PACA as alleged in the Complaint (7 U.S.C. § 499b(4)).[6]

For the foregoing reasons, the following Order should be issued.

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[6]See note 2.

Order

The facts and circumstances set forth in this Decision and Order shall be published.

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